

ATTACHMENT D

Contract Number DP00_____

**for *Software License and Associated
Services***

Between the

WASHINGTON STATE

DEPARTMENT OF TRANSPORTATION

and

[Name Of Vendor]

SOFTWARE LICENSE CONTRACT

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Exhibit B: Vendor's Proposal for *[Name Of Acquisition]*

Note: Exhibits A and B are not attached but are available upon request from the Purchaser Contract Administrator

SOFTWARE LICENSE AGREEMENT

NUMBER DP00____

PARTIES

This Software License Contract (hereinafter referred to as "Contract") is entered into by and between the State of Washington, acting by and through Department of Transportation, an agency of Washington State government (hereinafter referred to as "Purchaser" or "WSDOT", located at PO Box 47430, Olympia, Washington, 98504-7430 and [Vendor's Name], a [corporation, sole proprietorship, partnership or other business form] licensed under UBI number [UBI number] and FEIN [FEIN # or SSN in lieu] to conduct business in the State of Washington (hereinafter referred to as "Vendor"), located at [list Vendor's address here] for the purpose of licensing [list item(s) to be licensed].

RECITALS

WHEREAS, the State of Washington, acting by and through WSDOT, issued a Request for Proposal (RFP), dated [Date], to license [list item(s) to be licensed]; and,

WHEREAS, the [Vendor's Name] submitted a timely proposal to the WSDOT's RFP and,

WHEREAS, the WSDOT evaluated all proposals properly submitted in response to the above-referenced RFP and has identified [Vendor's Name] as the apparently successful Vendor; and,

WHEREAS, the WSDOT has determined that entering into an Contract with [Vendor's Name] will meet the needs of the Purchaser and will be in the Purchaser's best interest;

NOW THEREFORE, the Purchaser awards to [Vendor's Name] this Software License Contract which shall govern Vendor's furnishing to WSDOT the [describe items being licensed] and other related services as indicated on the schedule titled, Approved Product List (attached hereto) at the prices set forth in the schedule titled, Vendor's Price List (attached hereto), in accordance with the Terms and Conditions of this Contract. This Contract is not for personal use.

IN CONSIDERATION of the mutual promises made to each other as hereinafter set forth, the parties agree as follows:

1. Definition of Terms

Definitions as used throughout this Contract shall have the meanings set forth below.

"Contract" shall mean this document, all schedules and exhibits, and all amendments hereto.

"Anniversary Date" shall mean the execution date of this Contract by both parties.

"Business Days and Hours" shall mean Monday through Friday, 8:00 AM to 5:00 PM, except for holidays observed by the State of Washington.

"Delivery Date" shall mean the date by which the Software ordered hereunder must be delivered, [if a specific date is set forth in the Contract, you may insert that date here by adding: "which shall be (fill in specific date)"].

"[Department/Commission/Board]" shall mean the same as "Purchaser", the WSDOT.

“FEIN” shall mean the Vendor’s Federal Employer Identification Number.

“License” shall mean the license granted by this Contract.

“Licensed Software” shall mean Software which is licensed pursuant to this Contract.

“Purchaser” shall mean the State of Washington, WSDOT, any division, section, office, unit or other entity of the WSDOT or any of the officers or other officials lawfully representing the WSDOT, which has executed this Contract with the Vendor for specified software and/or services under the authority of this Contract.

“Purchaser Contract Administrator” shall mean that person designated by the WSDOT to administer this Contract on behalf of the WSDOT as further defined in the section titled Purchaser Contract Administrator.

“Purchaser Contracting Officer” shall mean the Chief of Management Information Services, or the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of the Contracting Officer acting within the limits of his/her authority.

“RCW” shall mean the Revised Code of Washington (Washington State Law).

“RFP” shall mean the Request for Proposal, or portions thereof, used as a solicitation document in this procurement, as well as all amendments and modifications thereto.

“Related Services” shall mean those services provided under this Contract and related to the Software license being acquired, that are appropriate to the scope of this Contract and includes such things as installation services, maintenance, etc.

“Software” shall mean the object code version of computer programs and any related documentation, excluding maintenance diagnostics. Software also means the source code version, where provided by Vendor.

“Specifications” shall mean the technical and other specifications set forth in Exhibit A, and any additional specifications set forth in, Exhibit B.

“SSN” shall mean the Vendor’s Social Security Number if used in lieu of Federal Employer Identification Number.

“Subcontractor” shall mean one not in the employment of the Vendor, who is performing all or part of those services under this Contract under a separate Contract with the Vendor. The term “subcontractor” means subcontractor(s) of any tier.

“UBI” shall mean the Vendor’s Washington State Uniform Business Identifier issued by the Department of Revenue.

“Vendor” shall mean *[Vendor’s Name]*, its employees and agents. “Vendor” also includes any firm, provider, organization, individual, or other entity performing services under this Contract. It shall also include any subcontractor retained by Vendor as permitted under the terms of this Contract.

“Vendor’s Account Manager” shall mean a representative of the Vendor who is assigned as the primary contact person whom the WSDOT Contract Administrator shall work with for the duration of this Contract unless replaced, with advance Purchaser approval, by another representative.

Contract Term

2. License Grant

- 2.1. Vendor grants to Purchaser a non-exclusive State-wide license to use the Software and related documentation according to the Terms and Conditions of this Contract (up to 500 copies).
- 2.2. Purchaser may modify any Vendor application Software and may combine such with other programs or materials to form an updated work, provided that upon discontinuance or termination of the license, the Vendor application Software will be removed from the updated work and, at the Purchaser's option, either destroyed or returned to Vendor.
- 2.3. Purchaser will not decompile or disassemble any Software provided under this Contract or modify Software which bears a copyright notice of any third party.
- 2.4. Purchaser will make and maintain no more than one archival copy of each item of Software, and each copy will contain all legends and notices and will be subject to the same conditions and restrictions as the original. Purchaser may also copy each item of Software to a single hard drive and multiple hard drives or networks.
- 2.5. Purchaser may move software from one device to another provided such software is completely removed from the first device after a reasonable testing period on the new device.

3. Term

License Term. The License for all Software provided pursuant to this Contract shall be perpetual.

4. Survivorship

- 4.1. All terms of this Contract will apply to items ordered prior to such termination date regardless of the expiration of this Contract.
- 4.2. All purchase transactions executed pursuant to the authority of this Contract shall be bound by all of the terms, conditions, price discounts and rates set forth herein, notwithstanding the expiration of the initial term of this Contract or any extension thereof. Further, the terms, conditions and warranties contained in the Contract that by their sense and context are intended to survive performance by the parties shall so survive the completion of the performance, cancellation or termination of the Contract for so long as the license remains in effect. In addition, the terms of the sections concerning Disputes, Limitation of Liability, Patent and Copyright Indemnification, and Protection of Purchaser's Confidential Information shall survive the termination of this Contract.

Pricing, Invoice and Payment

5. Pricing

- 5.1. The Vendor agrees to provide the Software and Related Services at the costs, rates, and fees set forth in the Price List attached as a schedule to this Contract. No other costs, rates, or fees shall be payable to the Vendor.
- 5.2. Maintenance fees - Upon expiration of the Vendor provided Warranty as set forth elsewhere in this Contract in the section titled Vendor Commitments, Warranties and Representations and upon election by the Purchaser to receive maintenance and support services from the Vendor, the Purchaser shall pay maintenance and support fees to the Vendor *[calculated at [_____] percent*

[()] % of the Vendor's then current license fee for the software product OR \$ ____ or other reasonable amount/method]. PROVIDED that, maintenance and support fee increases shall be capped at five percent (5) % annually from one year to the next and may only be increased on the anniversary date of the Contract.

Purchaser shall pay maintenance charges on a monthly basis, in arrears. Payment of maintenance service/support of less than one (1) month's duration shall be prorated at 1/30th of the basic monthly maintenance charges for each calendar day.

- 5.3. The Purchaser shall pay maintenance charges on a monthly basis, in arrears. Payment of maintenance service of less than one (1) month's duration shall be prorated at 1/30th of the basic monthly maintenance charges for each calendar day.
- 5.4. At least 120 days before the end of the then current term of this Contract, license term or term of maintenance and support, the Vendor may propose license fees and maintenance and support (service) rate increases by written notice to the Purchaser Contract Administrator. Price adjustments will be taken into consideration by the Purchaser Contract Administrator when determining whether to extend this Contract.
- 5.5. The Vendor agrees all the prices, terms, warranties, and benefits provided in this Contract are comparable to or better than the terms presently being offered by the Vendor to any other governmental entity purchasing the same quantity under similar terms. If the Vendor shall, during the term of this Contract, enter into contracts with any other governmental entity providing greater benefits or more favorable terms than those provided by this Contract, the Vendor shall be obligated to provide the same to the Purchaser.

6. Advance Payment Prohibited

No advance payment shall be made for the Software and Related Services furnished by Vendor pursuant to this Contract.

7. Taxes

The Purchaser will pay sales and use taxes imposed on the Software or Related Services acquired hereunder. The Vendor must pay all other taxes including, but not limited to, Washington Business and Occupation Tax, taxes based on the Vendor's income, or personal property taxes levied or assessed on the Vendor's personal property to which the Purchaser does not hold title. Purchaser, as an agency of the Washington State government, is exempt from property tax.

8. Invoice and Payment

- 8.1. The Vendor will submit properly itemized invoices and/or vouchers to the Purchaser. Invoices shall provide and itemize, as applicable:
 - a) Contract number WSDOT DP00____
 - b) Description of software, including quantity ordered
 - c) Date of delivery and/or date of installation
 - d) Vendor's List price for each item
 - e) Applicable discounts
 - f) Monthly maintenance charges
 - g) Net invoice price for each item
 - h) Applicable taxes

- i) Shipping costs
 - j) Other applicable charges
 - k) Total invoice price
 - l) Payment terms including any available prompt payment discounts
- 8.2. Such payments shall be due and payable within thirty (30) days after receipt and Acceptance of such goods or services or thirty (30) days after receipt of properly prepared invoices, whichever is later.
- 8.3. Incorrect or incomplete invoices will be returned by the Purchaser to the Vendor for correction and reissue.
- 8.4. This Contract number WSDOT DP00___ must appear on all invoices, bills of lading, packages, and correspondence relating to this Contract. The Purchaser shall not honor drafts, nor accept goods on a sight draft basis.
- 8.5. If the Purchaser fails to make timely payment, Vendor may invoice the Purchaser one percent (1%) per month on the amount overdue or a minimum of \$1.00. Payment will not be considered late if a check or warrant is mailed and postmarked within thirty (30) days of Acceptance of the Software or receipt of Vendor's properly prepared invoice, whichever is later.

9. Overpayments to Vendor

Upon notice of an erroneous payment or overpayment to which Vendor is not entitled pursuant to this Contract, Vendor shall promptly refund to Purchaser the full amount of any such payment or overpayment.

Vendor Responsibilities

10. Software Ownership

Vendor shall maintain all title, copyright, and other proprietary rights in the Programs. Purchase does not acquire any rights, express or implied, in the Programs, other than those specified in this Contract.

Vendor as Licensor hereby warrants and represents to Purchaser as Licensee that Vendor is the owner of the software and licensed programs delivered hereunder or otherwise has the right to grant to Purchaser the licensed rights to the software and licensed programs provided by Vendor through this Contract without violating any rights of any third party, and that there is currently no actual or threatened suit by any such third party based on an alleged violation of such right by Vendor.

11. Software Delivery

- 11.1. The Vendor shall deliver the Software ordered pursuant to this Contract on or *[specified in the Purchase Order or Field Order or name the date]*. For any exception to this Delivery Date, the Vendor must notify the Purchaser and obtain prior approval in writing. Time is of the essence with respect to delivery and the Vendor may be subject to liquidated damages and/or termination of the Contract and/or other damages available under law for failure to deliver on time.
- 11.2. All Software deliveries made pursuant to this Contract must be complete. Incomplete deliveries or backorders will not be accepted by Purchaser unless the Vendor has obtained prior written approval from Purchaser Contract Administrator. All packages must be accompanied by a packing slip which identifies all items included with the shipment and the Purchaser's Purchase Order number. The Vendor's delivery receipt must be signed by an authorized representative of Purchaser for all deliveries made hereunder.

- 11.3. *[Provide any other delivery instructions, e.g. no deliveries after 3:00 PM, or must prearrange deliveries with specified person, etc.]*

12. Risk of Loss and Shipping

The Vendor shall ship all Software purchased pursuant to this Contract, freight prepaid, FOB Purchaser's destination. The method of shipment shall be consistent with the nature of the goods and hazards of transportation. Regardless of FOB point, Vendor agrees to bear all risks of loss, damage, or destruction of the Software ordered hereunder which occurs prior to *[delivery or Acceptance, whichever is applicable]*, except loss or damage attributable to the Purchaser's fault or negligence; and such loss, damage, or destruction shall not release Vendor from any obligation hereunder. After *[delivery or Acceptance, whichever is applicable]*, the risk of loss or damage shall be borne by the Purchaser, except loss or damage attributable to the Vendor's fault or negligence.

13. Installation of Software by Vendor

[If the Vendor is going to install the licensed software - the following section can be used:]

Vendor shall install the Licensed Software on Purchaser's designated computer system in accordance with the *[(applicable industry standards) or (specification in Schedule C) or (set forth the requirements in this section)]*.

[- OR -]

xx. Installation of Software by Purchaser

[If the agency is going to install the licensed software - the following section can be used:]

All installation of the licensed Software purchased pursuant to this Contract for use by Purchaser will be by, and at the sole expense, of Purchaser.

14. Software Specifications

[use only if applicable schedule is developed - or modify to conform to defined term "Specifications"]

Software Specifications are listed and described on Schedule D *[complete an attachment for Specifications OR attach vendor provided specifications]* attached hereto and by this reference made a part hereof, as though completely set forth herein. Vendor warrants that products delivered hereunder shall perform in accordance with these specifications.

15. Software Upgrades and Enhancements

[Software upgrades and enhancements can outline several areas of Vendor responsibilities. Add to / delete from the following list after negotiation for the specific Contract if purchasing this coverage, otherwise delete section.]

Vendor shall be required:

- 15.1. To supply at no added cost updated versions of the Software to operate on upgraded versions of operating systems;
- 15.2. To supply updated versions of the software which encompass improvements, extensions, or other changes which Vendor, at its discretion, deems to be logical improvements or extensions of the original products supplied to the Purchaser; and
- 15.3. To supply interface modules which are developed by the Vendor for interfacing the software to other software products. Each of these items may be negotiated independently, depending upon the circumstances, with regard to each party's responsibilities, costs, etc. Refer to sections titled

16. Software Maintenance and Support Services

[This support often comes with the acquisition of a separately stated maintenance package.]

Vendor shall provide a replacement copy or correction service at no additional cost to the Purchaser for any error, malfunction, or defect, if any, in the Vendor supplied software which, when used as delivered, fails to perform in accordance with Vendor's officially announced technical specifications or Vendor's proposal and which the Purchaser shall bring to Vendor's attention. Vendor shall undertake such correction service as set forth below and shall use its best efforts to make corrections in a manner which is mutually beneficial. Vendor shall disclose all known defects and their detours or workarounds to the Purchaser.

In addition, Vendor shall provide the following services:

- 16.1. Telephone Support. Vendor will provide telephone support, toll-free in the United States, to Purchaser during Business Days and hours. Vendor's telephone service shall include but is not limited to the section of the following services:
 - 16.1.1. Assistance related to questions on the use of the subject Software;
 - 16.1.2. Assistance in identifying and determining the causes of suspected errors or malfunctions in Software;
 - 16.1.3. Advice on detours or workarounds for identified errors or malfunctions, where reasonably available;
 - 16.1.4. Information on errors previously identified by Purchaser and reported to Vendor and detours to these where available; and
 - 16.1.5. Advice on the completion and authorization for submission of the required form(s) reporting identified problems in the Software to Vendor.
- 16.2. On-line Support. Vendor may execute on-line diagnostics from a remote Vendor location to assist in the identification and isolation of suspected Software errors or malfunctions.

[For the Error and Malfunction Service, the agency should build escalation procedures with different response times and requirements depending upon the severity class of specific types of problems.]

- 16.3. Error and Malfunction Service. Within two (2) Business Days of receiving oral or written notification by the Purchaser of identified errors or malfunctions in the Software, Vendor will either:
 - 16.3.1. Provide Purchaser with detour or code correction to the Software error or malfunctions. Each detour or code correction will be made available in the form of either a written correction notice or machine-readable media and will be accompanied by a level of documentation adequate to inform Purchaser of the problem resolved and any significant operational differences resulting from the correction which is known by Vendor, or
 - 16.3.2. Provide Purchaser with a written response describing Vendor's then existing diagnosis of the error or malfunction and generally outlining Vendor's then-existing plan and timetable for correcting or working around the error or malfunction.
- 16.4. Maintenance Release Services. Vendor will provide error corrections and maintenance releases to the Software which have been developed by Vendor. Such releases shall be licensed to Purchaser pursuant to the Terms and Conditions of this Contract. Each maintenance release will consist of a set of programs and files made available in the form of machine-readable media and

will be accompanied by a level of documentation adequate to inform Purchaser of the problems resolved including any significant differences resulting from the release which are known by Vendor. Vendor agrees that each maintenance release of Software will be compatible with the then current unaltered release of Software applicable to the computer system.

- 16.5. On-Call Support. If a problem occurs which significantly impacts Purchaser's usage of the licensed Software and remains unidentified or unresolved either by detour or permanent correction after Purchaser has taken the Vendor prescribed action, Vendor will dispatch a representative to the system location during Business Days and hours, which representative must arrive within [_____ ()] business hours. Vendor will provide or make available:
- 16.5.1. Advice and assistance in diagnosis and identification of errors or malfunctions in the licensed Software.
- 16.5.2. On-site consultation on correction or detour of identified errors or malfunctions.
- 16.5.3. Advice and assistance on completion of form to report errors or malfunctions to Vendor as specified in the reporting procedure.
- 16.6. When Vendor performs services pursuant to this Contract which require the use of the Purchaser's computer system(s), the Purchaser agrees to make it available at reasonable times and in reasonable time increments, and in no event will the Purchaser charge the Vendor for such system use.

17. Reauthorization Code Required

[use if applicable to particular software]

If a reauthorization code must be keyed in by Vendor for the licensed Software to remain functional upon movement to another computer system. Vendor shall provide the reauthorization code to Purchaser within one (1) business day after receipt of Purchaser's notice of its machine upgrade or movement.

[- OR -]

A reauthorization code must be keyed in by Vendor for the licensed Software to remain functional upon movement to another computer system. Vendor shall provide the reauthorization code to Purchaser:

- 17.1. in connection with a machine upgrade or other movement for which Purchaser pays Vendor a machine upgrade fee as set forth in Section B, immediately upon receipt of such fee, or
- 17.2. if Purchaser need not pay a fee or other charge in connection with the machine upgrade or other movement, within one business day after receipt of Purchaser's notice of its machine upgrade or movement.

18. Software Documentation

- 18.1. Vendor will provide software documentation at the earlier of installation of this software or within thirty (30) days after execution of this Contract or as otherwise mutually agreed, in the form of the same number of manuals as licensed users of the Software or another mutually agreed number of manuals, adequate for use of software ordered under the sections of this Contract. Manual upgrades will be provided on a no-charge basis through the Vendor's local sales and service office.
- 18.2. For all Vendor programs furnished to the Purchaser within the scope of this Contract, the Vendor agrees that in the event it withdraws its support, if any, from such programs, it will immediately furnish to the Purchaser, if requested, at no additional cost, sufficient documentation to permit the Purchaser to maintain, modify or enhance such purchased or licensed programs.

- 18.3. Vendor grants to the Purchaser the right to copy or otherwise reproduce manuals and documentation furnished pursuant to this section, for use within the scope of this Contract at no additional charge.

19. Installation (Site) Security

While on the Purchaser's premises, Vendor, its agents, employees, or subcontractors shall conform in all respects with physical, fire, or other security regulations communicated to Vendor.

20. Use of Purchaser's Property and Facilities

- 20.1. Any property of the Purchaser furnished to the Vendor shall, unless otherwise provided herein, or approved by the Purchaser, be used only for the performance of this Contract.
- 20.2. The Vendor shall be responsible for any loss or damage to property of the Purchaser which results from willful misconduct or negligence on the part of the Vendor or which results from the failure on the part of the Vendor to maintain and administer that property in accordance with sound management practices, to ensure that the property will be returned to the Purchaser in like condition to that in which it was furnished to the Vendor. Upon the happening of loss, or destruction of, or damage to, any Purchaser property, the Vendor shall notify the Purchaser thereof and shall take all reasonable steps to protect that property from further damage.
- 20.3. The Vendor shall surrender to the Purchaser all property belonging to the Purchaser upon completion, termination, or cancellation of this Contract. All reference to the Vendor under this section shall include any of its employees, agents, or subcontractors.

21. Vendor Commitments, Warranties and Representations

- 21.1. Any written commitment by the Vendor within the scope of this Contract shall be binding upon the Vendor. Failure of the Vendor to fulfill such a commitment may constitute breach and shall render the Vendor liable for liquidated or other damages due the Purchaser under the terms of this Contract.
- 21.2. For purposes of this Contract, a commitment by the Vendor, which must be in writing, includes:
- 21.2.1. prices, discounts, and options committed to remain in force over a specified period of time;
 - 21.2.2. any warranty or representation made by the Vendor in a proposal as to hardware or software performance or any other physical, design or functional characteristics of a machine, software package, system, training, services or other products within the scope of this Contract;
 - 21.2.3. any warranty or representation made by the Vendor concerning the characteristics or items in (2) above, contained in any literature, descriptions, drawings or specifications accompanying or referred to in a proposal;
 - 21.2.4. any modification of or affirmation or representation as to the above which is made by Vendor in writing during the course of negotiation whether or not incorporated into a formal amendment to the proposal in question; and
 - 21.2.5. any representation by the Vendor in a proposal, supporting documents or negotiations subsequent thereto as to training to be provided, services to be performed, prices and options committed to remain in force over a fixed period of time or any other similar

matter regardless of the fact that the duration of such commitment may exceed the duration of this Contract.

22. Year 2000 Compliance Warranty

Vendor warrants that the Software provided pursuant to this Contract is Year 2000 compliant. This warranty includes a representation that dates on and after the year 2000 do not cause computational problems nor do these dates diminish the functionality of the Software including, but not limited to, date data century recognition, calculations that accommodate same century and multi-century formulas and date values, year 2000 leap year calculations, and date data interface values that reflect the century. Failure to comply with Year 2000 requirements shall entitle Purchaser to a refund of three (3) times the initial license fee as liquidated damages.

23. Physical Media Warranty

- 23.1. Vendor warrants to Purchaser that each licensed copy of the licensed Software provided by Vendor is and will be free from physical defects in the media that tangibly embodies the copy (the "Physical Media Warranty"). The Physical Media Warranty does not apply to defects discovered more than *[thirty (30), ninety (90) or other reasonable time frame]* Business Days after the date of acceptance of the Software copy by the Purchaser.
- 23.2. The Physical Media Warranty does not apply to defects arising from acts of non-Vendor employees, agents or subcontractors after the media has left Vendor's control, theft, vandalism, fire, water, acts of God or other perils beyond the control of Vendor.
- 23.3. Purchaser shall be entitled to replacement by Vendor of any Software copy provided by Vendor that does not comply with this warranty at Vendor's expense, including shipping and handling costs.

24. No Surreptitious Code Warranty

[This warranty may be included if a standard warranty package is purchased.]

- 24.1. Vendor warrants to Purchaser that no copy of the licensed Software provided to Purchaser contains or will contain any Self-Help Code nor any Unauthorized Code as defined below. The warranty is referred to in this Contract as the "No Surreptitious Code Warranty".
- 24.2. As used in this Contract, "Self-Help Code" means any back door, time bomb, drop dead device, or other software routine designed to disable a computer program automatically with the passage of time or under the positive control of a person other than a licensee of the program. Self-Help Code does not include software routines in a computer program, if any, designed to permit an Owner of the computer program (or other person acting by authority of the Owner) to obtain access to a licensee's computer system(s) (e.g. remote access via modem) for purposes of maintenance or technical support.
- 24.3. As used in this Contract, "Unauthorized Code" means any virus, Trojan horse, worm or other software routines or hardware components designed to permit unauthorized access: to disable, erase, or otherwise harm software, hardware, or data; or to perform any other such actions. The term Unauthorized Code does not include Self-Help Code.
- 24.4. Vendor will defend Purchaser against any Claim, and Indemnify Purchaser against any loss or expense arising out of any breach of the No Surreptitious Code Warranty.

25. Compatibility

[use only if applicable schedule is developed.]

Vendor acknowledges that other products listed in Schedule A are available for purchase, lease or license to the Purchaser, and are similar in function to that being delivered hereunder. Both the products to be delivered and the products in Schedule A are data and program compatible with Purchaser's existing systems, so that Purchaser's existing data files and applications programs will operate on Software contracted for herein without necessity for alteration, emulation or other modification.

26. Compliance with Standards

[use only if applicable schedule is developed.]

Vendor represents that all software, and elements thereof, including but not limited to, documentation, and source code, shall meet and be maintained by Vendor to conform to applicable industry standards.

27. Training

Training will be in accordance with the RFP and applicable portions will be attached and incorporated by reference.

28. Minority and Women's Business Enterprise (MWBE) Participation

[The following MWBE section is applicable only when MBE or WBE credit was given to Vendor's Response during evaluation of the competitive bid.]

29. Protection of Purchaser's Confidential Information

- 29.1. Vendor acknowledges that some of the material and information which may come into its possession or knowledge in connection with this Contract or its performance, may consist of confidential data, the disclosure of which to, or use by, third parties could be damaging. Therefore, access to, among other items, information concerning individual recipients of the State's services or individual clients shall not be granted except as authorized by law or agency rule. Vendor agrees to hold all such information in strictest confidence, not to make use thereof for other than the performance of this Contract, to release it only to authorized employees or subcontractors requiring such information, and not to release or disclose it to any other party. Vendor agrees to release such information or material only to subcontractors who have signed a written agreement expressly prohibiting disclosure. Vendor further agrees to either destroy or return all such information at the end of the term of this Contract.
- 29.2. This section does not impose any obligation on the Vendor if the information is: (1) publicly known at the time of disclosure; (2) already known to the receiving party at the time it is furnished to the Vendor; (3) furnished by the Purchaser to others without restrictions on its use or disclosure; or (4) independently developed by the receiving party without use of the proprietary information.

Contract Termination

30. Termination for Default

- 30.1. If either the Purchaser or the Vendor violate any material term or condition of this Contract or fail to fulfill in a timely and proper manner its obligations under this Contract, then the

aggrieved party shall give the other party written notice of such failure or violation. The responsible party will correct the violation or failure within thirty (30) Business Days or as otherwise mutually agreed. If the failure or violation is not corrected the Contract may be terminated immediately by written notice from the aggrieved party to the other party. The option to terminate shall be at the sole discretion of the aggrieved party.

- 30.2. In the event of termination of this Contract by Purchaser, the Purchaser shall have the right to procure the Services that are the subject of this Contract on the open market and the Vendor shall be liable for all damages, including, but not limited to: (1) the cost difference between the original Contract price for the Services and the replacement costs of such Services acquired from another Vendor; (2) if applicable, all administrative costs directly related to the replacement of the Contract, such as costs of competitive bidding, mailing, advertising, applicable fees, charges or penalties, staff time costs; and, (3) any other costs to the Purchaser resulting from the Vendor's breach. The Purchaser shall have the right to deduct from any moneys due to the Vendor, or that thereafter become due, an amount for damages that the Vendor will owe the Purchaser for the Vendor's default.
- 30.3. If the Vendor fails to perform any substantial obligation under this Contract, the Purchaser shall give the Vendor written notice of such failure to perform. If after thirty (30) calendar days from the date of the written notice Vendor still has not performed, then the Purchaser may withhold all moneys due and payable to Vendor, without penalty to the Purchaser, until such failure to perform is cured or otherwise resolved.
- 30.4. If it is determined for any reason the failure to perform is without the defaulting party's control, fault, or negligence, the termination shall be deemed to be a Termination For Convenience.
- 30.5. This section shall not apply to any failure(s) to perform that result from the willful or negligent acts or omissions of the aggrieved party.

31. Termination for Convenience

- 31.1. When it is in the best interest of the Purchaser, the Department Contracting Officer may terminate this Contract, in whole or in part, by thirty (30) calendar days / written notice to the Vendor. Invocation of the Termination For Withdrawal Of Authority, or Termination For Non-Allocation Of Funds sections shall be deemed a termination for convenience but will not require such) thirty (30) calendar days notice.
- 31.2. If this Contract is so terminated, the Purchaser is liable only for payments required by the terms of this Contract for Software and Related Services received and accepted by the Purchaser prior to the effective date of termination.

32. Termination for Withdrawal of Authority

In the event that the authority of the Purchaser to perform any of its duties is withdrawn, reduced, or limited in any way after the effective date of this Contract and prior to normal completion, the Purchaser may terminate this Contract under the Termination For Convenience section. This section shall not be construed so as to permit the Purchaser to terminate this Contract in order to acquire similar Software from a third party.

33. Termination for Non-Allocation of Funds

If funds are not allocated to continue this Contract in any future period, the Purchaser will not be obligated to pay any further charges for Software or Related Services including the net remainder of agreed to consecutive periodic payments remaining unpaid beyond the end of the then-current period. The Purchaser agrees to notify the Vendor of such non-allocation at the earliest possible time. No penalty

shall accrue to the Purchaser in the event this section shall be exercised. This section shall not be construed so as to permit the Purchaser to terminate this Contract in order to acquire similar Software or services from a third party.

34. Termination for Conflict of Interest

- 34.1. The Purchaser may terminate this Contract by written notice to the Vendor if it is found, after due notice and examination, that there is a violation by any of the parties hereto of:
 - 34.1.1. Ethics in Public Service, chapter 42.52 RCW; or
 - 34.1.2. Any other laws regarding ethics in public acquisitions and procurement and performance of contracts.
- 34.2. In the event this Contract is terminated as provided above pursuant to a violation by the Vendor, the Purchaser shall be entitled to pursue the same remedies against the Vendor as it could pursue in the event of a breach of the Contract by the Vendor.

35. Termination Procedure

- 35.1. Upon termination of this Contract, the Purchaser, in addition to any other rights provided in this Contract, may require the Vendor to deliver to the Purchaser any property or Software specifically produced or acquired for the performance of such part of this Contract as has been terminated. The sections for the Treatment Of Assets shall apply in such property transfer.
- 35.2. Unless otherwise provided herein, the Purchaser shall pay to the Vendor the agreed-upon price, if separately stated, for the Software or services received and accepted by the Purchaser, PROVIDED THAT, in no event shall the Purchaser pay to the Vendor an amount greater than the Vendor would have been entitled to if this Contract had not been terminated. Failure to agree with such determination shall be a dispute within the meaning of the Disputes section of this Contract. Purchaser may withhold from Vendor any amounts due the Vendor for such completed work or Services such sum as the Purchaser Contract Administrator determines to be necessary to protect the Purchaser from potential loss or liability.
- 35.3. After receipt of a notice of termination, and except as otherwise directed by the Purchaser, the Vendor shall: *(Delete steps below which are inapplicable to your contractual situation)*
 - 35.3.1. Stop work under this Contract on the date, and to the extent specified, in the notice;
 - 35.3.2. If termination is to the Software license purchase sections of this Contract, then Purchaser shall place no further orders and Vendor shall accept no further orders for additional Software license;
 - 35.3.3. If termination is to the Software license, then except as otherwise agreed to by the parties, Purchaser shall, at its option, surrender to Vendor or destroy and provide Vendor with a certificate signed by the Purchaser Contract Administrator attesting to the destruction of all copies of the licensed Software purchased pursuant to this Contract and terminated by this section, remaining in the possession of Purchaser, its employees or agents;
 - 35.3.4. If termination is to the Maintenance and Support sections, Vendor shall complete, notwithstanding the effective date of termination, all maintenance and support requests made prior to the date of notice of termination;
 - 35.3.5. As soon as practicable, but in no event longer than thirty (30) calendar days after termination, terminate its orders and subcontracts related to the work which has been

terminated and settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Purchaser to the extent required, which approval or ratification shall be final for the purpose of this section;

- 35.3.6. Complete performance of such part of this Contract as shall not have been terminated by the Purchaser;
 - 35.3.7. Take such action as may be necessary, or as the Purchaser may direct, for the protection and preservation of the property related to this Contract which is in the possession of the Vendor and in which the Purchaser has or may acquire an interest;
 - 35.3.8. Transfer title excluding licensed software to Purchaser and deliver in the manner, at the times, and to the extent directed by the Purchaser Contract Administrator, any property which is required to be furnished to Purchaser; and
 - 35.3.9. Provide written certification to the Purchaser that the Vendor has surrendered to the Purchaser all said property.
- 35.4. The Vendor shall pay within thirty (30) days of notice, the damages due Purchaser as the result of termination.

36. Covenant Against Contingent Fees

- 36.1. The Vendor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, *except* bona fide employees or a bona fide established commercial or selling agency of the Vendor.
- 36.2. In the event of breach of this section by the Vendor, the Purchaser shall have the right to either annul this Contract without liability to the Purchaser, or, in the Purchaser's discretion, deduct from payments due to Vendor, or otherwise recover from Vendor, the full amount of such commission, percentage, brokerage, or contingent fee.

Disputes and Remedies

37. Disputes

- 37.1. In the event a bona fide dispute concerning a question of fact arises between the Vendor and the Purchaser and it cannot be resolved between the parties with the aid of the Purchaser Contract Administrator, either party may initiate the dispute resolution procedure provided herein.
- 37.2. Time is of the essence in resolving disputes. The initiating party shall reduce its description of the dispute to writing and deliver it to the responding party. The responding party must respond in writing within three (3) Business Days.
 - 37.2.1. Then, both parties shall have three (3) Business Days to negotiate in good faith to resolve the dispute. If the dispute cannot be resolved after the three (3) Business Days, a dispute resolution panel may be requested in writing by either party who shall also identify the first panel member.
 - 37.2.2. Within three (3) Business Days of receipt of the initiating party's request, the responding party will designate a panel member. Those two panel members will appoint a third individual to the panel within the next three (3) Business Days.

- 37.2.3. The panel will review the written descriptions of the dispute, gather additional information as needed, and render a decision on the dispute in the shortest practical time.
- 38.3 Both parties agree to be bound by the determination of the panel of arbitrators.
- 38.4 Both parties agree to exercise good faith in dispute resolution and to settle disputes prior to using a dispute panel whenever possible.
- 37.3. The Purchaser and the Vendor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract which are not affected by the dispute.
- 37.4. If the subject of the dispute is the amount due and payable by Purchaser for maintenance services being provided by Vendor, Vendor shall continue providing maintenance during the pendency of the dispute provided Purchaser pays Vendor the amount Purchaser, in good faith, believes is due and payable, and places in escrow the difference between such amount and the amount Vendor, in good faith, believes is due and payable.

38. Non-Exclusive Remedies

The remedies provided for in this Contract shall not be exclusive but are in addition to all other remedies available under law.

39. Liquidated Damages

39.1. Liquidated Damages - General

- 39.1.1. Any delay by the Vendor in meeting the *[delivery date or installation date, maintenance or repair date, whichever is applicable and Standard of Performance and Acceptance date]* set forth in this Contract will interfere with the proper implementation of the Purchaser's programs to the loss and damage of the Purchaser.
- 39.1.2. As it would be impracticable to fix the actual damage sustained in the event of any such failure(s) to perform, the Purchaser and the Vendor, therefore, agree that in the event of any such failure(s) to perform, the amount of damage which will be sustained will be the amount set forth in the following sections and the parties agree that the Vendor shall pay such amounts as liquidated damages and not as a penalty.
- 39.1.3. Liquidated damages provided under the terms of the Contract are subject to the same limitations as provided in the section titled Limitation of Liability.

39.2. Liquidated Damages - Specific

- 39.2.1. If Vendor does not have the Software *[delivered by the Delivery Date or installed by the Installation Date, whichever is applicable]* and operational in accordance with the Standard of Performance and Acceptance date agreed upon between the Purchaser and Vendor, then Vendor shall pay to the Purchaser as fixed and agreed liquidated damages for each calendar day between the specified *[Delivery Date or Installation Date]* and the date that Vendor actually *[delivers or installs]* the Software and Software is operational in accordance with the Standard of Performance and Acceptance an amount of *[fixed dollar amount per day or percentage of total cost (purchase price plus applicable tax and shipping) of the delinquent Software per day]*, up to a maximum of *[_____ (___)]* calendar days *[length of time that is appropriate for specific acquisition]*.

- 39.2.2. If the delay is more than [_____] (__) {greater than the above number}} calendar days, then by written notice to the Vendor, the Purchaser may terminate the right of Vendor to [deliver or install] the Software or make the Software operational in accordance with the Standard of Performance and Acceptance and the Purchaser may obtain substitute Software from another vendor as specified in the Termination for Default section of this Contract. In this event, the Vendor shall be liable for liquidated damages, in the amount specified above, until substitute Software is [delivered or installed], or [_____] (__) days [length of time that is appropriate for specific acquisition] from the original [Delivery Date or Installation Date], whichever occurs first.
- 39.2.3. If Vendor's maintenance personnel fail to arrive at the Purchaser's installation site within [two (2) hours or whatever was agreed upon] after notification by the Purchaser that maintenance is required, the Vendor shall pay to the Purchaser as fixed and agreed liquidated damages, in lieu of all other damages due to such non-responsiveness, for each hour between the agreed [two (2) hours or whatever was agreed upon] response time and the actual response time an amount of [_____] dollars [(\$_____)] per hour for each "late" hour or part thereof (prorated) beginning with the time of notification by the Purchaser and ending with the time that Vendor's maintenance personnel arrive at the Purchaser's site.

40. Limitation of Liability

- 40.1. The parties agree that neither the Vendor nor the Purchaser shall be liable to each other, regardless of the form of action, for consequential damages. The parties further agree that neither shall be liable to the other for any lost profits or any demand or claim, regardless of the form of action, against either party by any other person except a claim or demand based on patent or copyright infringement, in which case liability shall be as set forth elsewhere in this Contract. This section does not modify any sections regarding liquidated damages, retainage or any other such conditions as are elsewhere agreed to herein between the parties. The damages specified in the sections titled OSHA/WISHA, Termination for Default and Review of Vendor's Records are not consequential damages as that term is used in this section.
- 40.2. Neither the Vendor nor the Purchaser shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of either the Vendor or the Purchaser. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of a governmental body other than Purchaser's acting in either its sovereign or contractual capacity, war, explosions, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of the Vendor, the Purchaser, or their respective subcontractors.
- 40.3. If delays are caused by a subcontractor without its fault or negligence, neither the Vendor nor the Purchaser shall be liable for damages for delays, unless the products or services to be furnished by their subcontractors were obtainable on comparable terms from other sources in sufficient time to permit the Vendor or the Purchaser to meet its required performance schedule.
- 40.4. Neither party shall be liable for personal injury to the other party or damage to the other party's property except personal injury or damage to property proximately caused by each party's respective fault or negligence.

Contract Administration

41. Notices

Any notice or demand or other communication required or permitted to be given under this Contract or applicable law (except notice of malfunctioning Software) shall be effective if and only if it is in writing, properly addressed, and either delivered in person, or by a recognized courier service, or deposited with the United States Postal Service as first-class certified mail, postage prepaid and return receipt requested, to the parties at the following addresses:

to **Vendor** at: *[Vendor Name]*
 Attention: [Name]
 [Street Address]
 [City]
 [State and Zip]

to **Purchaser** at: State of Washington
 Department of Transportation
 Attention:

Notwithstanding the sections of RCW 1.12.070, such communications shall be effective upon the earlier of receipt or four (4) days after mailing. The notice address as provided herein may be changed by written notice given as provided above.

42. Section Headings, Incorporated Documents and Order of Precedence

- 42.1. The headings used herein are inserted for convenience only and shall not control or effect the meaning or construction of any of the sections.
- 42.2. Each of the documents listed below is, by this reference, hereby incorporated into this Contract as though fully set forth herein. In the event of any inconsistency in this Contract, the inconsistency shall be resolved in the following order of precedence:
 - 42.2.1. Applicable Federal and State statutes, laws, and regulations;
 - 42.2.2. Sections of this Contract *[Contract Number]*;
 - 42.2.3. Schedule A - Approved Product List, to this Contract;
 - 42.2.4. Schedule B - Approved Price List, to this Contract;
 - 42.2.5. Exhibit A - State of Washington, Department of Transportation Portions of the Request For Proposal 96-____(RFP)] dated *[Date]*;
 - 42.2.6. Exhibit B -Portions of Vendor's Response to the WSDOT RFP, dated *[Date]*;
 - 42.2.7. All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, and other written representations pertaining to the herein-stated Software the Vendor made available to the Purchaser and used to effect this sale to the Purchaser, or purports said Software is fit for a particular purpose or attests to said Software's engineering level, operating condition, functions, capabilities, or merchantability.

43. Entire Agreement

This Contract sets forth the entire agreement between the parties with respect to the subject matter hereof and except as provided in the Section titled Vendor Commitments, Warranties, and Representations understandings, agreements, representations, or warranties not contained in this Contract or a written amendment hereto shall not be binding on either party. Except as provided herein, no alteration of any of the terms, conditions, delivery, price, quality, or specifications of this Contract will be effective without the written consent of both parties.

44. Additional Services and Software

Purchaser and Vendor agree that additional Services and/or Software, which are appropriate to the scope of this Contract, may be added to this Contract (Schedules A and B hereto) by an instrument in writing, with the mutual consent of both parties. Such writing shall include a specific description of the additional Services and/or Software, pricing and additional Terms and Conditions as relevant. The additional Services and/or Software shall be available under the same Terms and Conditions established herein, unless otherwise agreed to in a signed writing.

45. Authority for Modifications and Amendments

No modification, amendment, alteration, addition or waiver of any section or condition of this Contract shall be effective or binding unless it is in writing and signed by an authorized representative of the Vendor and the Purchaser. Only the Purchaser Contracting Officer or delegate by writing shall have the express, implied, or apparent authority to alter, amend, modify, add, or waive any section or condition of this Contract on behalf of the Purchaser.

46. Changes and Modifications

The Purchaser Contract Officer, may, at any time, by written notification to the Vendor, make changes in the general scope of the Contract. If any such changes cause an increase or decrease in the cost of, or the time required for the performance of this Contract, an equitable adjustment may be made in the Contract price or period of performance, or both, and the Contract shall be modified in writing accordingly in accordance with the terms of this Contract. Any claim by the Vendor for adjustment under this section must be asserted within thirty (30) days from the date of Contractor's receipt of the notice of such change; PROVIDED, however, that the Purchaser may, upon determining that the facts justify such action, receive and act upon such claim asserted at any time prior to final payment under this Contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the section of this Contract entitled Disputes. However, nothing in this section shall excuse the Vendor from proceeding with the Contract as changed.

47. Purchaser Contract Administrator

The Purchaser shall appoint an individual who will be the Purchaser Contract Administrator for this Contract and will provide oversight of the activities conducted hereunder. The Purchaser Contract Administrator will manage this Contract on behalf of the Purchaser and will be the principal point of contact for the Vendor concerning Vendor's performance hereunder and for receipt of notices. The Purchaser shall notify Vendor, in writing, when there is a new Purchaser Contract Administrator assigned to this Contract.

48. Vendor's Account Manager

The Vendor shall appoint an individual who will be the Account Manager for the Purchaser's account. The Vendor's Account Manager will be the principal point of contact for the Purchaser concerning the

Vendor's performance hereunder and for receipt of notices. The Vendor's Account Manager will also serve as the focal point for business matters, support coordination, and administrative activities.

49. Independent Status of Vendor

The parties hereto, in the performance of this Contract, will be acting in their individual, corporate or governmental capacities and not as agents, employees, partners, joint ventures, or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever, nor will the Vendor make any claim of right, privilege or benefit which would accrue to an employee under Chapter 41.06 RCW, Chapter 23B.16 RCW, nor Title 51 RCW.

50. Governing Law

This contract shall be construed and interpreted in accordance with the laws of the state of Washington.

The Vendor agrees that the venue of any action or suit concerning this contract shall be in the Thurston County Superior Court and all actions or suits thereon shall be brought therein. The Vendor agrees to accept service of process within the state of Washington at any office maintained therein. If such offices are not maintained, the Vendor designates the Secretary of State as an agent for the purpose of service of process.

51. Subcontractors

The Vendor may, with prior written permission from the Purchaser Contract Administrator, which consent shall not be unreasonably withheld, enter into subcontracts with third parties for its performance of any part of the Vendor's duties and obligations. In no event shall the existence of a subcontract operate to release or reduce the liability of the Vendor to the Purchaser for any breach in the performance of the Vendor's duties. For purposes of this Contract, Vendor agrees that all subcontractors shall be held to be agents of the Vendor, and the Vendor further agrees to hold the Purchaser harmless from acts or omissions of the Vendor's subcontractors, their agents, or employees subject to the limitations set forth in the Limitation of Liability section of this Contract. The Purchaser shall not be liable for any loss or damage resulting from personal injury, physical loss, harassment of employee, or violations of the Patent And Copyright Indemnification sections of this Contract occasioned by the acts or omissions of the Vendor's subcontractors, their agents or employees. The Patent And Copyright Indemnification sections of this Contract shall apply to all subcontractors.

52. Assignment

- 52.1. With the prior written consent of the Purchaser the Vendor may assign this Contract including the proceeds hereof: PROVIDED that such assignment shall not operate to relieve the Vendor of any of its duties and obligations hereunder, nor shall such assignment affect any remedies available to the Purchaser that may arise from any breach of the sections of this Contract, its supplements, or warranties made herein including but not limited to, rights of setoff.
- 52.2. With the prior written consent of the Vendor, the Purchaser may assign this Contract to any public agency, commission, board, or the like, within the political boundaries of the State of Washington: PROVIDED that such assignment shall not operate to relieve the Purchaser of any of its duties and obligations hereunder.

53. Publicity

The Vendor agrees to submit to the Purchaser, all advertising, sales promotion, and other publicity matters relating to this agreement or any Product furnished by the Vendor wherein the Purchaser's name is mentioned or language used from which the connection of the Purchaser's name therewith may, in Purchaser's judgment, be inferred or implied. The Vendor further agrees not to publish or use such advertising, sales promotion, or publicity matter without the prior written consent of the Purchaser.

54. Review of Vendor's Records

- 54.1. The Vendor and its subcontractors shall maintain books, records, documents and other evidence of accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature invoiced in the performance of this Contract and shall retain all such records for six (6) years after the expiration or termination of this Contract. Records involving matters in litigation related to this Contract shall be kept for one year following the termination of litigation, including all appeals if the litigation has not terminated within five years from the date of expiration or termination of the Contract.
- 54.2. All such records shall be subject at reasonable times and upon prior notice to examination, inspection, copying, or audit by personnel so authorized by the Purchaser's Contract Administrator and/or the Office of the State Auditor and federal officials so authorized by law, rule, regulation or Contract, when applicable. During the term of this Contract, access to these items will be provided within Thurston County. During the six-year period after the term or five year term following litigation, delivery of and access to the listed items will be at no cost to the State. The Vendor shall be responsible for any audit exceptions or disallowed costs incurred by the Vendor or any of its subcontractors.
- 54.3. The records retention and review requirements of this section shall be incorporated by the Vendor in any of its subcontracts.
- 54.4. It is agreed that books, records, documents and other evidence of accounting procedures and practices related to the Vendor's cost structure, to include overhead, general and administrative expenses, and profit factors shall be excluded from the Purchaser's review unless the cost or any other material issue under this Contract is calculated or derived from these factors.

General

55. Patent and Copyright Indemnification

- 55.1. Vendor will, at its expense, defend or settle any claim against the Purchaser that equipment, Software, or work products supplied hereunder infringes any patent, copyright, utility model, industrial design, mask work or trademark. Vendor will pay resulting costs, damages and attorney's fees finally awarded provided that Purchaser:
 - 55.1.1. promptly notifies Vendor in writing of the claim; and
 - 55.1.2. cooperates with and agrees to use its best efforts to encourage the Attorney General of Washington to grant Vendor sole control of the defense and all related settlement negotiations.
- 55.2. Vendor will pay all costs of such defense and settlement and any costs and damages awarded by a court or incurred by Purchaser, except costs paid to the Office of the Attorney General as legal fees. If such claim has occurred, or in Vendor's opinion is likely to occur, Purchaser agrees to permit Vendor at its option and expense, either to procure for Purchaser the right to continue using the Software or to replace or modify the same so that they become noninfringing and

functionally equivalent. If use of the Software is enjoined by a court and the Vendor determines that none of these alternatives is reasonably available, Vendor, at its risk and expense, will take back the Software and refund its depreciated value. Depreciated value shall be calculated on the basis of a useful life of five (5) years commencing on the effective date of purchase and shall be an equal amount per year over said useful life. The depreciation for fractional parts of a year shall be prorated on the basis of 365 days per year. In the event the Software has been installed less than one year, transportation to the initial installation site paid by Purchaser shall be refunded by Vendor.

55.3. Vendor has no liability for any claim of infringement arising from:

55.3.1. Vendor's compliance with any designs, specifications or instructions of the Purchaser;

55.3.2. Modification of the Software by Purchaser or a third party without the prior knowledge and approval of Vendor; or

55.3.3. Use of the Software in a way not specified by Vendor;

unless the claim arose against Vendor's Software or support independently of any of these specified actions.

56. Save Harmless

Vendor shall protect, indemnify and save the Purchaser harmless from and against any damage, cost, or liability, including reasonable attorneys' fees, by third parties for any or all injuries to persons or damage to property arising from intentional, willful or negligent acts or omissions of Vendor, its officers, employees, agents, or subcontractors.

57. Industrial Insurance Coverage

Prior to performing work under this Contract the Vendor shall provide or purchase industrial insurance coverage for its employees, as may be required of an "employer" as defined in Title 51 RCW, and shall maintain full compliance with Title 51 RCW during the course of this Contract. The Purchaser will not be responsible for payment of industrial insurance premiums or for any other claim or benefit for the Vendor, or any subcontractor or employee of the Vendor, which might arise under the industrial insurance laws during the performance of duties and services under this Contract.

58. Licensing Standards

The Vendor shall comply with all applicable local, state, and federal licensing requirements and standards necessary in the performance of this Contract. (See, for example, Chapter 19.02 RCW for State licensing requirements and definitions.)

59. OSHA/WISHA

Vendor represents and warrants that its products, when shipped, are designed and manufactured to meet then current Federal and State safety and health regulations. Vendor further agrees to indemnify and hold the Purchaser harmless from all damages assessed against the Purchaser as a result of the failure of the items furnished under this Contract to so comply.

60. UCC Applicability

60.1. Except to the extent the sections of this Contract are clearly inconsistent, this Contract shall be governed by any applicable sections of the Uniform Commercial Code (UCC) as set forth in Title 62A RCW.

- 60.2. To the extent this Contract entails delivery or performance of services, such services shall be deemed "goods" within the meaning of the UCC, except when to so deem such services as "goods" would result in an absurdity.
- 60.3. Notwithstanding the Section Headings, Incorporated Documents and Order of Precedence section of this Contract, in the event of any clear inconsistency or contradiction between this Contract and the UCC, the Terms and Conditions of this Contract take precedence and shall prevail unless otherwise provided by law.

61. Anti-Trust Violations

Vendor and Purchaser recognize that in actual economic practice overcharges resulting from antitrust violations are in fact usually borne by the Purchaser. Therefore, the Vendor hereby assigns to the Purchaser any and all claims for such overcharges as to goods and services purchased in connection with this Contract, except as to overcharges not passed on to the Purchaser resulting from anti-trust violations commencing after the date of the bid, quotation, or other event establishing the price under this Contract.

62. Compliance with Civil Rights Laws

During the performance of this Contract, the Vendor shall comply with all federal and applicable state nondiscrimination laws, including but not limited to: Title VII of the Civil Rights Act, 42 U.S.C 12101 et seq.; the Americans with Disabilities Act (ADA); and Title 49.60 RCW, Washington Law Against Discrimination. In the event of the Vendor's noncompliance or refusal to comply with any nondiscrimination law, regulation or policy, this Contract may be rescinded, canceled or terminated in whole or in part under the Termination for Default sections, and the Vendor may be declared ineligible for further Contracts with the Purchaser. The Vendor shall be given a reasonable time in which to cure noncompliance. In addition to the cancellation of this Contract, Vendor may be subject to penalties under federal and state law.

63. Quiet Possession and Usage

Vendor warrants that the Purchaser upon paying the amounts due hereunder and performing all other covenants, terms, and conditions on its part to be performed hereunder, may and shall peacefully and quietly have, hold, possess, and enjoy the Software for the term provided without suit, molestation, or interruption.

64. Severability

If any term or condition of this Contract or the application thereof to any person(s) or circumstances is held invalid, such invalidity shall not affect other terms, conditions or applications which can be given effect without the invalid term, condition, or application; to this end the Terms and Conditions of this Contract are declared severable.

65. Waiver

Waiver of any breach of any term or condition of this Contract shall not be deemed a waiver of any prior or subsequent breach. No term or condition of this Contract shall be held to be waived, modified or deleted except by a written instrument signed by the parties hereto.

66. Treatment of Assets

- 66.1. Title to all property furnished by the Purchaser shall remain in the Purchaser. Title to all property furnished by the Vendor, for which the Vendor is entitled to reimbursement, other than rental payments, under this Contract, shall pass to and vest in the Purchaser pursuant to the section titled Software Ownership. As used in this section Treatment of Assets, if the “property” is the Vendor’s proprietary, copyrighted works, only the applicable license, not title, is passed to and vested in the Purchaser.
- 66.2. Any property of the Purchaser furnished to the Vendor shall, unless otherwise provided herein or approved by the Purchaser, be used only for the performance of this Contract.
- 66.3. The Vendor shall be responsible for any loss or damage to property of the Purchaser which results from the negligence of the Vendor or which results from the failure on the part of the Vendor to maintain and administer that property in accordance with sound management practices.
- 66.4. Upon loss, or destruction of, or damage to any Purchaser property, the Vendor shall notify the Purchaser thereof and shall take all reasonable steps to protect that property from further damage.
- 66.5. The Vendor shall surrender to the Purchaser all property of the Purchaser prior to settlement upon completion, termination, or cancellation of this Contract.
- 66.6. All reference to the Vendor under this section shall also include Vendor’s employees, agents, or subcontractors.

67. Vendor’s Proprietary Information

Vendor acknowledges that the Purchaser is subject to Chapter 42.17 RCW, the Public Disclosure Act and that this Contract shall be a public record as defined in RCW 42.17.250 to .340. Any specific information that is claimed by the Vendor to be confidential or proprietary, must be clearly identified as such by the Vendor. To the extent consistent with Chapter 42.17 RCW, the Purchaser shall maintain the confidentiality of all such information marked confidential or proprietary. If a request is made to view Vendor’s proprietary information, the Purchaser will notify Vendor of the request and of the date that such records will be released to the requester unless Vendor obtains a court order enjoining that disclosure. If Vendor fails to obtain the court order enjoining disclosure, the Purchaser will release the requested information on the date specified.

Contract Execution

68. Authority to Bind

The signatories to this Contract represent that they have the authority to bind their respective organizations to this Contract.

In Witness Whereof, the parties hereto, having read this Contract in its entirety, including all attachments hereto, do agree thereto in each and every particular and thus the parties have set their hands hereunto.

Approved

State of Washington,

Department of Transportation

Approved

[Vendor’s Name]

Signature

Signature

Print or Type Name

Print or Type Name

Title Date

Title Date

Approved as to Form

State of Washington,
Office of the Attorney General

Signature

Print or Type Name

Assistant Attorney General

Title Date

Schedule A

Approved Product List

Schedule A
Approved Product List
for
Contract No. [XXX-XXX-XXX]
with
[Vendor]

Vendors are authorized to sell **only the products identified in this Schedule A** under the above-referenced Contract.

This Schedule may only be modified in writing by the Purchaser Contract Administrator.

Product Category	Products	Effective Date

Vendor Signature

Contract Administrator Name

Title

Date

Purchaser Contract Administrator

Title

Date

Schedule B

Vendor's Price List

Schedule C

ESCROW AGREEMENT

This Software License Contract (hereinafter referred to as "Contract") is entered into by and between the State of Washington, acting by and through [Agency Name], an agency of Washington State government (hereinafter referred to as "Purchaser" or "[Agency Name]" or "[Department/Commission/Board]") located at PO Box 4[xxxx], Olympia, Washington, 98504-[xxxx] and [Vendor's Name], a [corporation, sole proprietorship, partnership or other business form] licensed under UBI number [UBI number] and FEIN [FEIN # or SSN in lieu] to conduct business in the State of Washington (hereinafter referred to as "Vendor"), located at [list Vendor's address here] for the purpose of licensing [list item(s) to be licensed].

This Escrow Contract (hereinafter referred to as "Escrow Contract") is entered into by and between the State of Washington, acting by and through [Agency Name] an agency of Washington State government (hereinafter referred to as Purchaser or "[Agency Name]" or "[Department/Commission/Board]"), located at PO Box 4[xxxx], Olympia, Washington, 98504-[xxxx] and [Vendor's Name], a [corporation, sole proprietorship, partnership or other business form] (hereinafter referred to as "Vendor"), located at [list Vendor's address here], and [Escrow Agent's Name], a [corporation, sole proprietorship, partnership or other business form] (hereinafter referred to as "Escrow Agent"), organized and existing under the laws of the State of [Agent's State of registration].

WHEREAS, the Vendor and the Purchaser have entered into a Software License Contract No. [XXX-XXX-XXX] to which this Schedule is appended hereto and made a part hereof, pursuant to which the Vendor has licensed to the Purchaser certain computer software product(s), including updates, improvements, and enhancements thereof from time to time developed by the Vendor, and such additional program changes as the Purchaser may order from the Vendor from time to time, all documentation therefor developed by the Vendor (hereinafter collectively referred to as the "Product"); and

WHEREAS, it is the policy of the Vendor not to disclose the Source Code(s) and related documentation (hereinafter collectively referred to as the ("Source Code Escrow Package") for the Product(s) to its customers except as provided in an applicable Escrow Contract; and

WHEREAS Vendor and the Purchaser agree that upon occurrence of certain events described in Section 3(a) hereof, the Purchaser shall be able to obtain the Source Code Escrow Package and all revisions thereof;

ACCORDINGLY, the Vendor agrees to deliver the Source Code Escrow Package to the Escrow Agent upon the effective date of this Escrow Contract, which shall be as soon as practicable after the effective date of the Software License Contract between Vendor and the Purchaser.

NOW THEREFORE, in consideration of the mutual covenants exchanged herein and for other valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Vendor, the Purchaser and the Escrow Agent hereby act and agree as follows:

1. DEPOSITS

The Escrow Agent, as a safekeeping (escrow) agent, agrees to accept from the Vendor the Source Code Escrow Package. "Source Code Escrow Package" shall mean the following:

- (a) a complete copy in machine-readable form of the Source Code and Executable Code of the Licensed Software;
- (b) a complete copy of any existing Design Documentation and User Documentation;
- (c) complete instructions for compiling and linking every part of the Source Code into Executable Code for purposes of enabling verification of the completeness of the Source Code as provided below. Such instructions shall include precise identification of all compilers, library packages, and linkers used to generate Executable Code.

The Escrow Agent will issue to the Vendor and Purchaser a receipt for the Source Code Escrow Package upon delivery. The Source Code Escrow Package held by the Escrow Agent shall remain the exclusive property of the Vendor, and the Escrow Agent shall not use the Source Code Escrow Package or disclose the same to any third party except as specifically provided for herein. The Escrow Agent will hold the Source Code Escrow Package in safekeeping at its office listed in Section 9 titled Notices below unless and until the Escrow Agent is to deliver the Source Code Escrow Package to Vendor or the Purchaser, in which case, the Escrow Agent shall deliver the Source Code Escrow Package to the party identified therein, subject, however, to the sections of this Escrow Contract.

2. REPRESENTATIONS OF VENDOR TO PURCHASER

Vendor represents and warrants to Purchaser that:

- a. The materials described in the Contract as software applications products hereto constitutes the Source Code Escrow Package and documentation for the Product licensed to the Purchaser pursuant to the software license and service Contract therein.
- b. The Source Code Escrow Package delivered to the Escrow Agent are in a form suitable for reproduction by computer and photocopy equipment, and consists of full source language statement of the program or programs comprising the Product and complete program maintenance documentation, including all flow charts, schematics and annotations which comprise the precoding detailed design specifications, and all other material necessary to allow a reasonably skilled third party programmer or analyst to maintain or enhance the Product without the help of any other person or reference to any other material; such Source Code Escrow Package to be in the mode machine readable by the then operating Purchaser hardware and produced and copied on 1600 bpi magnetic tape.
- c. The Vendor will promptly supplement the source Code delivered hereunder with all revisions, corrections, enhancements or other changes so that the Source Code Escrow Package constitutes a human readable program for the current release of the Product. This supplementation shall be made in machine readable format by the then operating Purchaser hardware and produced and copied on 1600 bpi magnetic tape, along with specifications of sections a. and b. herein, every six (6) months or within ten (10) days of delivery of any modification, enhancement, or upgrade to the Purchaser or any other customer of the Vendor, whichever occurs first.

3. NOTICE OF DEFAULT

- a. The Vendor shall be deemed to be in default of its responsibilities to the Purchaser if:
 - i. the Vendor becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign;
 - ii. the Vendor has wound up or liquidated its business voluntarily or otherwise and the Purchaser has compelling reasons to believe that such events will cause the Vendor to fail to meet its warranties and maintenance obligations in the foreseeable future; or

- iii. the Vendor voluntarily or otherwise discontinues support of the provided products or fails to support the products in accordance with its warranties and maintenance obligations.

The Purchaser shall give written notice ("Notice Of Default") to the Escrow Agent of any default by the Vendor. The Notice of Default shall, at the minimum:

- i. be labeled "Notice of Default";
 - ii. identify the Software License Contracts and any other relevant agreement, contained therein and this Escrow Contract;
 - iii. specify the nature of the default(s);
 - iv. identify the Source Code Escrow Package with specificity; and
 - v. demand the delivery of the Source Code Escrow Package to the Purchaser.
- b. Upon receipt of the Notice of Default, the Escrow Agent shall send a copy thereof to the Vendor by certified or registered mail, postage prepaid, return receipt requested. The Escrow Agent shall be automatically authorized and directed to deliver the Source Code Escrow Package to the Purchaser in accordance with this Escrow Contract within ten (10) days.

4. NOTICE OF TERMINATION

Upon the termination of the applicable Software License Contracts, the Vendor may obtain the return of the applicable Source Code Escrow Package to terminated software applications products by furnishing written notice of the termination, agreed to by authorized and notarized signature of the Purchaser.

5. DISPUTES

Escrow Agent shall not release the Source Code Escrow Package to either party except in accordance with the completion of any the sections in Section 3, or receipt of an agreement with authorized and notarized signatures of both Vendor and the Purchaser, authorizing the release of the Source Code Escrow Package to one of the parties hereto.

6. PAYMENT OF ESCROW

As payment for its services hereunder, the Escrow Agent shall receive a fee of _____ from the Vendor.

7. TERMINATION

Unless terminated sooner, this Escrow Contract shall terminate on the delivery of the Source Code Escrow Package of software applications products to Vendor or Purchaser as provided herein.

8. WAIVER, AMENDMENT OR MODIFICATION; SEVERABILITY

This Escrow Contract shall not be waived, amended, or modified except by the written agreement of all the parties hereto. Any invalidity, in whole or in part, of any section of this Escrow Contract shall not affect the validity of any other of its sections.

9. NOTICES

All notices required to be given hereunder shall be in writing and shall be given by certified or registered mail, return receipt requested, to the parties at their respective addresses as follows:

to **Vendor** at: *[Vendor Name]*
 Attention: [Name]
 [Street Address]

[City]

[State]

to **Purchaser** at: State of Washington
[Agency]
Attention: [Contract Administrator/Officer, per agency policy]
[Agency Address]
Olympia, WA 98504-[XXXX]

to **Escrow Agent** at: [Escrow Agent's Name]
Attention: [Name]
[Street Address]
[City]
[State]

10. **LIMITATION ON ESCROW AGENT'S RESPONSIBILITY AND LIABILITY**

- a. The Escrow Agent shall not be obligated or required to examine or inspect the Source Code Escrow Package, or any of the Additions. The Escrow Agent's obligation for safekeeping shall be limited to providing the same degree of care for the Source Code Escrow Package as it maintains for its valuable documents and those of its customers lodged in the same location with appropriate atmospheric or other safeguards. However, the parties agree and acknowledge that the Escrow Agent shall not be responsible for any loss or damage to any of the Source Code Escrow Package due to changes in such atmospheric conditions, unless such changes are proximately caused by the gross negligence or malfeasance of the Escrow Agent.
- b. The Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, receipt or other paper or document furnished to it, not only in assuming its due execution but also the validity and effectiveness of its information therein contained, which it in good faith believes to be genuine and what it purports to be.
- c. In no event shall the Escrow Agent be liable for any act or failure to act under the sections of the Escrow Contract except where its acts are the result of gross negligence or malfeasance. The Escrow Agent shall have no duties except those which are expressly set forth herein, and it shall not be bound by any notice of a claim, or demand, termination or rescission of the Escrow Contract, unless in writing received by it, and, if its duties herein are affected, unless it shall have given its prior written consent thereto.
- d. The parties to this Contract hereby together indemnify the Escrow Agent against any loss, liability or damage, including reasonable costs of litigation and counsel fees, arising from and in connection with the performance of its duties under this Contract.

11. GOVERNING LAWS

This contract shall be construed and interpreted in accordance with the laws of the state of Washington.

The vendor agrees that the venue of any action or suit concerning this contract shall be in the Thurston County Superior Court and all actions or suits thereon shall be brought therein. The vendor agrees to accept service of process within the state of Washington at any office maintained therein. If such offices are not maintained, the vendor designates the Secretary of State as an agent for the purpose of service of process.

12. AUTHORITY TO BIND

The signatories to this Contract represent that they have the authority to bind their respective organizations to this Contract.

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Contract to be duly executed in triplicate originals and each triplicate shall be deemed an original copy of the Contract signed by each party, for all purposes, as of the year and date last written below.

[Agency Name]

[Vendor's Name]

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____

ESCROW AGENT

By: _____

Its: _____

Date: _____

Schedule D

MWBE Certification

Schedule E

Installation Specifications